

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

<b>BETWEEN:</b>	)	
	)	
TED SIPSAS and LESLIE CARRUTHERS	)	<i>Justin R. Winch</i> , for the Plaintiffs
	)	
Plaintiffs	)	
	)	
– and –	)	
	)	
1299781 ONTARIO INC.	)	<i>Barry Nussbaum</i> , for the Defendant
	)	
Defendant	)	
	)	
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	)	
	)	
	)	
	)	<b>HEARD:</b> November 16, 2015

2016 ONSC 212 (CanLII)

**REASONS FOR DECISION**

**HOOD J.**

**Nature of Dispute**

[1] The plaintiffs are the owners of 173 Gooch Avenue, Toronto, Ontario. The defendant is the owner of 171 Gooch Avenue, the lot immediately to the south. The plaintiffs seek a declaration that they own a portion of 171 Gooch Avenue, through adverse possession (“the Disputed Lands”).

[2] As set out in the Agreed Statement of Facts, filed by the parties as Exhibit 1 at trial, the Disputed Lands consist of a series of concrete steps, a board retaining wall, a metal wire fence, two affixed sheds and the area enclosed within two fences.

[3] Attached to these reasons as Schedule A is a sketch of the Disputed Lands put into evidence by the plaintiffs. The Disputed Lands are outlined in bold. The sketch shows a “Board Fence” and a “Fence”. Attached to these reasons as Schedule B is a survey obtained by the defendant subsequent to its purchase which shows the layout of the two properties. The survey

does not outline the Disputed Lands, although it does indicate the structures within the Disputed Lands. Nor does it show the “Fence”.

[4] 171 & 173 Gooch Avenue (171 and 173 Gooch) were converted to Land Titles on October 22, 2001. While the Agreed Statement of Facts refers to the conversion date as October 22, 2015, this is a clear error.

[5] The defendant purchased 171 Gooch on December 18, 2006. The plaintiffs purchased 173 Gooch from Mr. & Mrs. Hendricks on September 28, 2007.

[6] After the plaintiffs had purchased 173 Gooch, the defendant listed 171 Gooch for sale. This led to the plaintiffs writing the defendant, advising that they owned the Disputed Lands, within 171 Gooch, and demanding that the defendant cease all attempts to sell 171 Gooch including the Disputed Lands. When the defendant failed to respond, the plaintiffs started an application and obtained a certificate of pending litigation on October 15, 2010 thereby effectively preventing any sale of 171 Gooch pending the resolution of the ownership of the Disputed Lands. The application was thereafter converted to an action resulting in the trial before me.

[7] While awkwardly worded, s. 4 of the *Real Property Limitations Act*, R.S.O. 1990, c. L. 15 provides that an owner’s title to land is extinguished by the adverse possession of another person for a continuous period of ten years.

[8] Under s. 51(1) of the *Land Titles Act*, R.S.O. 1990, c. L. 5 no title can be obtained by adverse possession against lands registered in Land Titles. However, there is an exception under s. 51(2) for title obtained by adverse possession before the registration.

[9] This means the plaintiffs obtained title to the Disputed Lands when they bought on September 28, 2007, if they can show that their predecessors in title, the Hendricks, established adverse possession over the Disputed Lands prior to October 22, 2001 when 171 Gooch was converted to Land Titles. In other words, did the plaintiffs’ predecessors, the Hendricks commence and establish adverse possession of the Disputed Lands for any continuous ten-year span prior to October 21, 2001? If so, the plaintiffs own the Disputed Lands. If not, the defendant does.

[10] This matter proceeded before me as a trial under the simplified procedure rules. Evidence in chief was given by the plaintiffs through identical affidavits. They were then cross-examined. The defendant’s evidence was also by way of affidavit, followed by cross-examination. One of the previous owners of 173 Gooch Avenue, Mr. Hendricks, was examined by both parties prior to trial. The parties agreed that the transcript of his examination, which was submitted at trial, was to be used by me as if Mr. Hendricks had testified at trial.

[11] A few facts were agreed to by the parties as set out in Exhibit 1. The rest of the facts I have determined based upon the affidavits, the cross-examinations and the transcript of Mr. Hendricks.

[12] I find that the plaintiffs have not made out a case of adverse possession of the Disputed Lands and accordingly dismiss their claim.

## **FACTS**

[13] The plaintiffs purchased 173 Gooch on September 28, 2007 from Mr. & Mrs. Hendricks. The Hendricks purchased 173 Gooch on July 9, 1969.

[14] 173 Gooch contains a two-storey brick house. The lot for 173 Gooch (Pt. Lot 3, Plan 2491) has a frontage of approximately 31 feet and a depth of approximately 105 feet and runs generally in an east west direction. Its backyard slopes upwards towards a home on Humbercrest Boulevard, which is a road running roughly parallel to Gooch to the west.

[15] 171 Gooch is to the south of 173 Gooch and its lot (Pt. Lot 4, Plan 2491) also runs generally in an east west direction with its backyard sloping upwards towards a home on Humbercrest Boulevard. Its lot size is approximately the same size as 173 Gooch. There is no house built on 171 Gooch. But for the two sheds, the concrete steps, the retaining wall and some fences, 171 Gooch is a vacant lot. The Disputed Lands are located on Pt. Lot 4.

[16] 171 Gooch was owned by Jennie Thompson from December 9, 1932, when she purchased the lot, until sometime in 2005 when the City of Toronto became the owner of the lot due to unpaid taxes. On December 18, 2006 the City sold 171 Gooch to the defendant for \$25,000.

[17] The Hendricks purchased their home at 173 Gooch in July, 1969 directly from its builder. According to Mr. Hendricks, they understood from the builder that the Disputed Lands to the south as enclosed by a wooden fence, which had also been built by the same builder when he built the house at 173 Gooch, was part of 173 Gooch.

[18] None of the purchase and sale documentation from this sale in 1969 including the deed to the Hendricks was put into evidence. Mr. Hendricks in his transcript evidence stated he always believed the Disputed Lands were part of 173 Gooch from the time he and his wife bought their home.

[19] This evidence of Mr. Hendricks is contradicted by the Agreement of Purchase and Sale signed by the Hendricks when they sold to the plaintiffs, which was put into evidence by the plaintiffs. The Agreement makes no mention of the Disputed Lands which are clearly on Pt. Lot 4, Plan 2491. What is referred to as being sold is part of Lot 3, Plan 2491, having a frontage of 31 feet with a depth of 105 feet. In other words the Hendricks sold 173 Gooch, not including the Disputed Lands. The Listing Agreement does make reference to a Garden Shed being included. However, I give more weight to the actual Agreement signed by the parties and the Statutory Declaration, also put into evidence by the plaintiffs, as executed by the Hendricks for

the purposes of closing. The Declaration refers only to Pt. Lot 3, Plan 2491, and makes no mention of Lot 4, Plan 2491. In paragraph 5 of the declaration, the Hendricks solemnly declare that they “do not retain the fee or ... right to grant ... with respect to any land abutting the lands being conveyed”, which are referenced as Pt. Lot 3, Plan 2491. Whatever the Hendricks may have felt about the Disputed Lands it is not reflected in the Agreement of Purchase and Sale or the Statutory Declaration on the sale of their property.

[20] Other than the wooden fence which apparently existed as at July, 1969, as constructed by the builder of 173 Gooch, 171 Gooch was a completely vacant wooded lot when bought by the Hendricks.

[21] Mr. Hendricks provided evidence during his examination that the Disputed Lands were not entirely enclosed when bought in 1969, and that perhaps only the “Fence” as shown on Schedule A was constructed by the builder and was there when the Hendricks bought. The “Board Fence” on the west of the Disputed Lands, also as shown on Schedule A, was built by Mr. Hendricks around 1973 - 1974 after they purchased. In any event, by 1974 the Disputed Lands were fenced in by the Hendricks.

[22] Mr. Hendricks built the wooden steps shown on Schedules A & B shortly after moving into 173 Gooch. In 1979 he built the most westerly shed to use as a tool shed and the other shed to use as a dog house and dog run. He testified that as far as he was concerned he built his sheds on land which he had purchased in 1969 when he bought 173 Gooch.

[23] The defendant’s president, Mr. Pereira, gave evidence by affidavit that shortly after the defendant purchased 171 Gooch in December, 2006 he spoke to the Hendricks. He claims they stated they had no current use for the Disputed Lands and they acknowledged that the Disputed Lands were not owned by them and were occupied by them with the consent of the defendant. I am prepared to accept that the Hendricks had no current use for the Disputed Lands and they said this to Mr. Pereira. Mr. Hendricks admitted as much in his examination. I am not prepared however to accept Mr. Pereira’s assertion that the Hendricks admitted that they now occupied the Disputed Lands with the defendant’s consent. During his examination Mr. Hendricks denies making such a statement. However, such an admission is not required in order to dismiss the claim for adverse possession. Whether they admitted it or not the Hendricks were not occupying the Disputed Lands adversely.

[24] There was much evidence given by both sides as to the state of the Fence on Schedule A and whether it fully enclosed the Disputed Lands to the east and south. The photos in Mr. Pereira’s affidavit show a dilapidated fence. While the photos are undated, presumably, they were taken after December, 2006 when the defendant bought Lot 171. As such they are unhelpful, as the current state of the Fence is irrelevant to the issue of adverse possession. Any adverse possession had to be established for a continuous ten-year period prior to October 22, 2001, when both properties were put into Land Titles. The plaintiffs’ evidence that the Disputed Lands were completely enclosed after their purchase of Lot 173 in September, 2007 is equally unhelpful for the same reason. All of the evidence given as to the height of the Fence, the gaps

in it, whether it could be stepped over or through and its state from 2006 onwards is not germane to the issue before me.

[25] The only person who could give evidence as to the state of the Fence prior to 2001 was Mr. Hendricks. However, his evidence from his examination was that he was unable to attest as to the state of the Fence when living at 173 Gooch as he never went out there to look.

[26] Mr. Hendricks gave evidence and I conclude that the only area actually used by the Hendricks consisted of the two sheds and the “Frame Deck”, the steps as shown on Schedule A and the area immediately to the north of the two sheds.

[27] Mr. Hendricks also gave evidence, which I accept, that he did not use the Disputed Lands during the winter, from approximately November through to March. One shed stored gardening tools which he did not use during the winter. The second shed was also not in use during the winter as the dog lived inside his home during those months. They only used the Disputed Lands seasonally.

[28] I also accept Mr. Hendrik’s evidence that he did not believe, when he was using the Disputed Lands from April to October, that he was excluding someone else’s right to them. It did not concern him.

[29] There was no evidence that the true owner, Ms. Thompson, was even aware of the use of her land by the Hendricks. Nor was there any evidence as to what her intended use of the land, including the Disputed Lands, was.

### Law

[30] The requirements for establishing possessory title by adverse possession are set out by Blair J.A. in *Masidon Investments Ltd. v. Ham* (1984), 45 O.R. (2d) 563 at paras. 14 – 15 (C.A.) :

Whether a prescriptive title has been acquired is a question of fact which must be determined in the light of the circumstances of each case. The legal principles which govern this determination were recently restated in this Court by Wilson J.A. in *Keefer v. Arillotta* (1976), 13 O.R. (2d) 680 at 692 , 72 D.L.R. (3d) 182 and in *Fletcher v. Storoschuk* (1981), 35 O.R. (2d) 722, 22 R.P.R. 75, 128 D.L.R. (3d) 59, where she said at p. 725:

...a person claiming a possessory title as against the legal owner must not only establish actual possession for the statutory period but he must establish that such possession was with the intention of excluding the true owner and that the true owner’s possession was effectively excluded for the statutory period.

It is clear that a claimant to a possessory title throughout the statutory period must have:

- (1) had actual possession;
- (2) had the intention of excluding the true owner from possession, and

- (3) effectively excluded the true owner from possession.

The claim will fail unless the claimant meets each of these three tests and time will begin to run against the owner only from the last date when all of them are satisfied: see *Wright v. Olmstead* (1911), 3 O.W.R. 434, 20 O.W.R. 701 (Div. Ct.), per Mulock C.J. at p. 435 and Wells J. in *Pflug and Pflug v. Collins*, [1952] O.R. 519 at 527, [1952] 3 D.L.R. 681, affirmed by this Court [1953] O.R. 140, [1953] 1 D.L.R. 841. The possession must be “open, notorious, constant, continuous, peaceful and exclusive of the right of the true owner”: see *Fletcher v. Storoschuk*, supra, at p. 725; *Ledyard v. Chase*, 57 O.L.R. 268, [1925] 3 D.L.R. 794, per Ridden J. at pp. 269-270. In the latter case Riddell J. concluded at p. 270 saying:

*Sherren v. Pearson*, 14 Can. S.C.R. 581, lays down the principle again, and adds that this possession must not be equivocal, occasional, or for a special or temporary purpose.

[31] In order to succeed, the plaintiffs must establish each of the three elements listed above. The plaintiffs must show that their predecessors’ acts of actual possession had the intention of and effectively excluded the owner from possession.

[32] As to the first requirement of actual possession the Hendricks use was seasonal and intermittent at best. This does not meet the requirement of being constant and continuous, see: *Van Straaten v. Nicholson*, 2002 Carswell Ont 2573 at paras. 34 & 35 (S.C.). As a result there was no actual possession of the Disputed Lands and the plaintiffs have not established the first test of adverse possession. Accordingly, their claim must fail.

[33] Nor have the plaintiffs established the second and third tests for adverse possession. While adverse possession does not require actual enclosure of the lands in issue, enclosure is the strongest evidence of it, see: *Clarke v. Babbitt*, 1925 CanLII 14 at para. 9 (Ont. C.A.). It may also lead to proof of the other tests, namely the intention to exclude and the actual exclusion of the true owner from possession.

[34] Here, Mr. Hendricks could not give evidence as to the state of the Fence as he never went out to look, which supports the defendant’s argument that the Hendricks had no intention to exclude Ms. Thompson, the true owner, from possession.

[35] This is not a case where both the claimant and the owner mistakenly believed the land in issue was owned by the claimant. Even if I was prepared to accept Mr. Hendrick’s evidence that he was told by the builder that the Disputed Lands were theirs and he actually believed this, there is no evidence as to what Ms. Thompson believed or what use she intended to make of the property.

[36] Inconsistent use is necessary for the second test of intending to exclude the true owner from possession. In *Masidon Investments* at para. 18 the Court referred to the decision of the Court of Appeal in *Fletcher v. Storoschuk* (1981), 35 O.R. (2d) 722, at p. 724 (C.A.) as follows:

...acts relied on to constitute adverse possession must be considered relative to the nature of the land and in particular the use and enjoyment of it intended to be made by the

owner: see *Lord Advocate v. Lord Lovat* (1880), 5 App. Cas. 273 at 288; *Kirby v. Cowderoy*, [1912] A.C. 599 at 603. The mere fact that the defendants did various things on the ... land is not enough to show adverse possession. The things they did must be inconsistent with the form of use and enjoyment the plaintiff intended to make of it: see *Leigh v. Jack* (1879), 5 Ex. D. 264; *St. Clair Beach Estates Ltd. v. MacDonald et al.* (1974), 5 O.R. (2d) 482, 50 D.L. R. (3d) 650; *Keefer v. Arillotta* (1976), 13 O.R. (2d) 680, 72 D.L.R. (3d) 182. Only then can such acts be relied upon as evidencing the necessary 'animus possidendi' vis-à-vis the owner.

[37] Again, in *Masidon Investments* at para. 32 Blair J.A. stated: "it suffices for this case to say that the appellant has not demonstrated acts of user which are inconsistent with the use of the respondents." I arrive at a similar decision with respect to the plaintiffs' case herein.

[38] There is no evidence put forward by the plaintiffs as to the use or intended use of the land by the defendant's predecessor in title, Ms. Thompson. The plaintiffs have failed to show that what their predecessors in title, the Hendricks, did was inconsistent with the form of use and enjoyment that Ms. Thompson intended to make of the land owned by her. The plaintiffs have not proven that the use of the Disputed Lands was with the intention of excluding the true owner from possession. Nor is there any evidence that what the Hendricks did was even known to Ms. Thompson, so that there could be an argument that she gave permission to the use of her property and the use was adverse to her ownership.

[39] The sale by them of part of Lot 3, without any mention of part of Lot 4, is consistent with this conclusion. The Hendricks knew that they had no claim to any of 173 Gooch. They knew that the property they were selling was only 171 Gooch, namely Part Lot 3, Plan 2491.

[40] As to costs, I was provided with a Costs Outline by the plaintiffs and with a Bill of Costs by the defendant. Being successful, the defendant is presumptively entitled to costs. I would hope that the parties will be able to agree on costs, but if they are unable to do so, the defendant will provide its submissions within two weeks of today's date, of no more than 2 pages, excluding any necessary attachments, such as offers to settle. The plaintiffs will provide their submissions within two weeks thereafter, also of no more than 2 pages, excluding any necessary attachments.

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**HOOD J.**

**Released:** February 3, 2016

**CITATION:** Sipsas v. 1299781 Ontario Inc., 2016 ONSC 212

**COURT FILE NO.:** CV-10-411640

**DATE:** 20160203

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

TED SIPSAS and LESLIE CARRUTHERS

Plaintiffs

– and –

1299781 ONTARIO INC.

Defendant

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**REASONS FOR DECISION**

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**HOOD J.**

**Released:** February 3, 2016